

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

JANUARY TERM, 1902.

No. 1176.

137

No. 15, SPECIAL CALENDAR.

UNITED STATES *EX REL.* HENRY D. PHILLIPS,
APPELLANT,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
AND H. CLAY EVANS, COMMISSIONER OF PENSIONS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1902.

No. 1176.

No. 15, SPECIAL CALENDAR.

UNITED STATES *EX REL.* HENRY D. PHILLIPS,
APPELLANT,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
AND H. CLAY EVANS, COMMISSIONER OF PENSIONS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

U. S. *ex Rel.* HENRY D. PHILLIPS, Appellant,
vs.
ETHAN A. HITCHCOCK, Sec'y, &c., ET AL. } No. 1176.

a Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* HENRY D. PHIL-
lips, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the In-
terior, and H. Clay Evans, Commissioner
of Pensions, Respondents.

No. 44947. At Law.

UNITED STATES OF AMERICA, { ss :
District of Columbia,

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Mandamus, &c.*

Filed September 25, 1901.

In the Supreme Court of the District of Columbia.

No. 44947.

To the honorable the supreme court of the District of Columbia:

The petition of Henry D. Phillips, of full age, a citizen of the United States residing in the city of Washington, in the said District of Columbia, respectfully shows that he is a person appearing of record, in the office of the Secretary of the Interior, as having complied with the requirements of the regulations prescribed by said Secretary for the recognition of attorneys or agents for claimants before the Department of the Interior, and is therefore and thereby authorized to prosecute any claim for pension before the Pension Bureau, in accordance with the rules and regulations of said Interior Department, and was so entitled on the fourth day of October, eighteen hundred and ninety-nine, and for a long time prior thereto; that your petitioner on said fourth day of October,

eighteen hundred and ninety-nine, as attorney for Thomas Irwin, who was a private in Company D, 77th regiment, Pennsylvania infantry, in the war known as the war of the rebellion, filed a declaration for increase of his pension theretofore granted, as hereinafter more particularly mentioned and set out; that prior to the said fourth day of October, eighteen hundred and ninety-nine, the said Thomas Irwin was granted an invalid pension, certificate No.

753,947, under and by virtue of the provisions of section 2 of the act of Congress entitled "An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and providing for pensions to widows, minor children and dependent parents," approved June 27th, 1890, which provides:

"That all persons who served ninety days, or more, in the military or naval service of the United States during the late war of the rebellion, and who have been honorably discharged therefrom, and who are now, or who may hereafter be, suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from the performance of manual labor in such a degree as to render them unable to earn a support, shall . . . be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding twelve dollars per month, and not less than six dollars per month, proportioned to the degree of inability to earn a support; and such pension shall commence from the date of the filing of the application in the Pension Office, after the passage of this act, upon proof that the disability then existed, and shall continue during the existence of the same."

That the said Thomas Irwin's last aforesaid pension was granted for the following-named "mental or physical disability," to wit, "general debility," and which said pension was granted at the rate of six dollars per month, and which said rate was "proportioned to the degree of (his) inability to earn a support."

That on said fourth day of October, eighteen hundred and ninety-nine, your petitioner, as attorney for the said Thomas Irwin, as aforesaid, filed in the Pension Bureau a declaration for increase of pension for said Thomas Irwin, in and by which said petition it was alleged that the pensioner was suffering from rheumatism, heart trouble, vertigo, and impaired sight, in addition to the disabilities for which he had formerly been pensioned, as aforesaid; and thereupon and thereafter such proceedings were had under said declaration for increase of pension, as aforesaid, that on March eighteenth, nineteen hundred and one, a certificate was issued by the Commissioner of Pensions, increasing the rate of pension of said Thomas Irwin to twelve dollars per month, to date from February twenty-first, nineteen hundred, the date of holding the medical examination had under such claim for increase.

That on the day of the issue of said certificate of increase of pension your petitioner was certified and paid a fee of two dollars for his services in said claim for increase, said Commissioner of Pen-

sions, so certifying, claiming that no greater fee was due and payable to your petitioner by reason of the provisions contained in the fourth proviso of "An act making appropriation for the payment of invalid and other pensions of the United States for the fiscal year ending June 3, 1892, and for other purposes," approved March 3rd, 1891, which reads as follows:

"Hereafter no agent or attorney shall demand, receive, or be allowed any compensation under existing law exceeding two dollars, in any claim for increase of pension, on account of the increase of the disability for which the pension has been allowed."

That the fourth section of the aforesaid act of June 27th, 1890, provides as follows:

4 "That no agent, attorney, or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act shall, directly or indirectly, contract for, demand, receive, or retain, for such services in preparing, presenting, or prosecuting such claim, a sum greater than ten dollars, which sum shall be payable only upon the order of the Commissioner of Pensions by the pension agent making payment of the pension allowed."

That on May thirteenth, nineteen hundred and one, your petitioner entered an appeal to the honorable the Secretary of the Interior from the action of the Bureau of Pensions in the certification and payment to him of the said fee of two dollars, on the issue aforesaid of March 18th, 1901, granting an increase of pension to the said Thomas Irwin, contending that he was entitled to a fee of ten dollars, under and by virtue of the provisions of the fourth section of the aforesaid act of June 27th, 1890, and that on June twentieth, nineteen hundred and one, the said honorable Secretary of the Interior denied the said appeal, and affirmed that "the fee in a claim for increase under the act of June 27th, 1890, regardless of the cause upon which said claim is based, is governed by the fourth proviso of the pension appropriation act of March 3rd, 1891, and cannot exceed two dollars."

Your petitioner shows that he has been advised and believes, and therefore charges, that as the original issue of pension to the said Thomas Irwin was granted on account of the following-named "mental or physical disability," to wit, "general debility," and that as

5 the issue of March eighteenth, nineteen hundred and one, increasing the said pension, was for the following-named "mental or physical disability," to wit, "rheumatism, heart trouble, vertigo, and impaired sight," your petitioner is entitled to be certified and paid a fee of ten dollars for preparing, presenting, and prosecuting the claim of the said Thomas Irwin for increased pension under the provisions of said act of June 27th, 1890.

Your petitioner therefore respectfully prays that a writ of mandamus may issue out of and under the seal of this honorable court, to be directed to the Honorable Ethan A. Hitchcock, Secretary of the Interior, and the Honorable H. Clay Evans, Commissioner of Pensions, commanding and enjoining him, the said Secretary of the Interior, to grant the prayer of your petitioner's said petition of ap-

peal aforesaid, and commanding and enjoining him, the said Commissioner of Pensions, to certify and order paid, according to the course and practice of the Pension Bureau, a fee of ten dollars provided for in the 4th section of said act of June 27th, 1890, or such part thereof as remains unpaid (two dollars thereof having been paid upon the certification and order of said Pension Commissioner upon the issue of said increase of pension certificate, as aforesaid); and your petitioner, as in duty bound, will ever pray, &c.

HENRY D. PHILLIPS,

Attorney pro Se.

SCOTT E. CAMMELL,

E. R. WALKER,

Of Counsel.

6 STATE OF NEW JERSEY, } ss:
County of Mercer,

Henry D. Phillips, the above-named petitioner, being duly sworn according to law, on his oath says that he has read over the foregoing petition and knows the contents thereof, and that the facts, matters, and things therein stated are true to the best of his knowledge, information, and belief.

HENRY D. PHILLIPS.

Sworn to and subscribed before me this 27th day of July, 1901.

WM. F. CLEMMER,

Notary Public.

[SEAL.]

Rule to Show Cause.

Filed — —, —.

In the Supreme Court of the District of Columbia.

UNITED STATES *ex Rel.* HENRY D. PHILLIPS, }
Petitioner,

vs.

H. CLAY EVANS, Commissioner of Pensions,
and Ethan A. Hitchcock, Secretary of the
Interior, Respondents.

At Law. No. 44947.
On Petition for
Mandamus.

Upon reading the petition for writ of mandamus in the above-entitled cause, and upon consideration of the same:

7. It is, on this 20th day of September, on motion of Henry D. Phillips, attorney *pro se*, ordered that the respondents do show cause before the undersigned, on the first day of October next (1901), at 10 o'clock in the forenoon, at the court-house, in circuit court room number two, in the city of Washington, D. C., why a writ of mandamus should not issue, according to the prayer of the said petition; and it is further ordered that a copy of the said petition and affidavit thereto annexed and of this order be served upon

each of the said respondents within five days from the date hereof.

E. F. BINGHAM,
Chief Justice.

Marshal's Return.

Served copy of within order and copy of the petition and affidavit in this cause on H. Clay Evans, Commissioner of Pensions, and on Thomas Ryan, acting Secretary of the Interior.
Sept. 25, 1901.

AULICK PALMER, *Marshal.*

8

Return to Rule to Show Cause.

Filed October 1, 1901.

In the Supreme Court of the District of Columbia.

UNITED STATES <i>ex Rel.</i> HENRY D. PHILLIPS	}	No. 44947. At Law.
<i>vs.</i>		
ETHAN A. HITCHCOCK, Secretary of Interior, and H. Clay Evans, Commissioner of Pen- sions.		

Now come the said respondents, Ethan A. Hitchcock, Secretary of the Interior, and H. Clay Evans, Commissioner of Pensions, and for a return to the rule to show cause heretofore, on the 20th day of September, 1901, issued in the above-entitled cause, why a writ of mandamus should not issue as prayed therein, respectfully show unto the court that the said petitioner hath not, in and by his said petition, set forth facts sufficient to require these respondents to do and perform the acts in said petition prayed, for the following reasons:

1. Because the subject-matter set forth in said petition is purely of executive cognizance, resting in the judgment and discretion of these respondents as Secretary of the Interior and Commissioner of Pensions in the ordinary discharge of their official duties.

2. Because the aforesaid subject-matter is one in which judgment and discretion are to be exercised.

3. Because the petition does not state facts sufficient to constitute a cause of action.

4. Because the petition is bad in substance.

9

Wherefore these respondents pray that the aforesaid rule may be discharged and that the said petition be dismissed at the cost of the petitioner.

ASHLEY M. GOULD,
Attorney for Respondents.

Replication.

Filed October 14, 1901.

In the Supreme Court of the District of Columbia.

UNITED STATES <i>ex Rel.</i> HENRY D. PHILLIPS,	} At Law. No. 44947.
Petitioner,	
<i>vs.</i>	
H. CLAY EVANS, Commissioner of Pensions,	} On Petition for
and Ethan A. Hitchcock, Secretary of the	
Interior, Respondents.	

And the said petitioner, Henry D. Phillips, as to the return to the rule to show cause herein of the said respondents, comes and says that the said petitioner, by reason of anything by the said respondents in the said return alleged, ought not to be barred from having a writ of mandamus issued out of and under the seal of this honorable court, to be directed to the said respondents, therein and thereby commanding and enjoining them as in and by his said petition in that behalf prayed for, because he says that he

10 has, in and by his said petition, set forth facts sufficient to require the said respondents to do and perform the acts in said petition prayed.

Wherefore your petitioner prays judgment and that he may have the said writ of mandamus awarded to him as prayed for in and by his said petition.

HENRY D. PHILLIPS,
Attorney pro Se.

Supreme Court of the District of Columbia.

FRIDAY, *January 24th*, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * *

UNITED STATES <i>ex Rel.</i> HENRY D. PHILLIPS,	} No. 44947. At Law.
Petitioner,	
<i>vs.</i>	
ETHAN A. HITCHCOCK, Secretary of the Interior, and H. Clay Evans, Commissioner of Pensions, Respondents.	}

This cause came on to be heard upon the petition filed herein for a writ of mandamus, the rule to show cause issued thereon, the return to said rule, and the other proceedings herein, and upon consideration thereof it is ordered that said rule be discharged and the petition dismissed at the cost of said petitioner.

11 From the foregoing the petitioner, by his attorney in open court, notes an appeal to the Court of Appeals of the District of Columbia, and appeal bond is waived.

Appeal.

Filed January 29, 1902.

In the Supreme Court of the District of Columbia.

UNITED STATES <i>ex Rel</i> HENRY D. PHILLIPS,	}	At Law. No. 44947.
Petitioner,		
<i>vs.</i>		
H. CLAY EVANS, Commissioner of Pensions,	}	
and Ethan Allan Hitchcock, Secretary of		
the Interior, Respondents.		

The clerk of said court will enter an appeal to the Court of Appeals of the District of Columbia, on behalf of Henry D. Phillips, from the final order and judgment entered January 24, 1902.

Washington, January 24, 1902.

HENRY D. PHILLIPS,
Attorney pro Se.

Citation and bond on appeal waived.
Washington, January 24, 1902.

ASHLEY M. GOULD,
Attorney for Respondents.

12 UNITED STATES OF AMERICA, } *ss* :
District of Columbia,

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 11, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 44947, at law, wherein United States *ex rel.* Henry D. Phillips is petitioner and Ethan A. Hitchcock, Secretary of the Interior, *et al.* are respondents, as the same remains upon the files and of record in said court.

Seal Supreme Court	In testimony whereof I hereunto subscribe
of the District of	my name and affix the seal of said court, at
Columbia.	the city of Washington, in said District,
	this 30th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

13 In the Court of Appeals of the District of Columbia.

UNITED STATES <i>ex Rel.</i> HENRY D. PHILLIPS, Petitioner,	}	No. 1176.
<i>vs.</i>		
H. CLAY EVANS, Commissioner of Pensions, and ETHAN		
Allan Hitchcock, Secretary of the Interior, Respondents.		

Stipulation.

The parties hereto do hereby stipulate that no agreement or contract for an attorney's fee was made by the applicant to his attorney, Henry D. Phillips, or filed under the declaration aforesaid, for services in the increase case in question.

H. D. PHILLIPS,
Attorney pro Se.
ASHLEY M. GOULD,
Attorney for Respondents.

January 30th, 1902.

(Endorsed :) No. 1176. Court of Appeals, D. C., January term, 1902. U. S. *ex rel.* Henry D. Phillips, appellant, *vs.* H. Clay Evans, Comm'r, &c., *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 30, 1902. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1176. U. S. *ex rel.* Henry D. Phillips, appellant, *vs.* Ethan A. Hitchcock, Sec'y, &c., *et al.* Court of Appeals, District of Columbia. Filed Jan. 30, 1902. Robert Willett, clerk.

FILED 17 1902
Robert Willitt

CLERK

MacCrellish & Quigley, Printers, Trenton, N. J.

Court of Appeals.

District of Columbia.

UNITED STATES, EX REL. HENRY D.
PHILLIPS,

Appellant,

vs.

ETHAN A. HITCHCOCK, SECRETARY
OF THE INTERIOR,

and

H. CLAY EVANS, COMMISSIONER
OF PENSIONS,

Appellees.

January Term,
1902.

No. 1176.

No. 15, Special
Calendar.

IRWIN CASE.

Brief for Appellant.

H. D. PHILLIPS,

Att'y pro se.

E. R. WALKER,

Of Counsel.

Court of Appeals.

District of Columbia.

UNITED STATES, EX REL. HENRY D. PHILLIPS,	Appellant,	January Term, 1902. No. 1176.
vs.		
ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR, and H. CLAY EVANS, COMMISSIONER OF PENSIONS,	Appellees.	No. 15, Special Calendar.
		IRWIN CASE.

Brief for Appellant.

STATEMENT.

The petition alleges that Mr. Phillips, a pension attorney, on October 4th, 1899, filed a declaration for Thomas Irwin, a soldier of the War of the Rebellion, for increase of his pension theretofore granted; that prior to the date mentioned Irwin was granted an invalid pension, under section 2 of the act of June 27th, 1890, which provides:

"That all persons who served ninety days, or more, in the military or naval service of the United States during the late War of the Rebellion, and who have been honorably discharged therefrom, and who are now, or who

may hereafter be, suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits, which incapacitates them from the performance of manual labor, in such a degree as to render them unable to earn a support, shall * * * be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding twelve dollars per month, and not less than six dollars per month, proportioned to the degree of inability to earn a support; and such pension shall commence from the date of the filing of the application in the pension office, after the passage of this act, upon proof that the disability then existed, and shall continue during the existence of the same."

Irwin's original pension was granted for "mental or physical disability," namely, "general debility," at the rate of \$6 per month, which rate was "proportioned to the degree of (his) inability to earn a support."

That on October 4th, 1899, a declaration for increase was filed, in which it was alleged that the pensioner was suffering from rheumatism, heart trouble, vertigo and impaired sight, in addition to the disabilities for which he had formerly been pensioned; on March 18th, 1901, a certificate was issued by the Commissioner of Pensions, increasing the rate of Irwin's pension to \$12 a month, to date from February 21st, 1900, the date of holding the medical examination under the claim for increase.

On the day of the issue of the certificate of increase the petitioner was certified and paid a fee of \$2 for his services in the claim for increase, the Pension Commissioner holding that no greater fee was payable, by reason of the provisions contained in the fourth proviso of "An act making appropriation for the payment of invalid and other pensions of the United States, for the fiscal

year ending June 3, 1892, and for other purposes," approved March 3d, 1891, which reads as follows:

"Hereafter no agent or attorney shall demand, receive or be allowed any compensation under existing law exceeding two dollars, in any claim for increase of pension, on account of the increase of the disability for which the pension has been allowed."

Section 4 of the act of June 27th, 1890, reads as follows:

"That no agent, attorney or other person engaged in preparing, presenting or prosecuting any claim under the provisions of this act shall, directly or indirectly, contract for, demand, receive or retain for such services in preparing, presenting or prosecuting such claim a sum greater than ten dollars, which sum shall be payable only upon the order of the Commissioner of Pensions, by the pension agent making payment of the pension allowed."

On May 13th, 1901, petitioner appealed to the Secretary of the Interior in the matter of the fee, claiming he was entitled to \$10, under section 4 of the act of June 27th, 1890, and on June 20th, 1901, the Secretary of the Interior denied the appeal, and affirmed that "the fee in a claim for increase under the act of June 27th, 1890, regardless of the cause upon which said claim is based, is governed by the 4th proviso of the Pension Appropriation Act of March 3, 1891, and cannot exceed \$2."

That the relator has been advised and believes, and therefore charges, that as the original pension was granted on account of "mental or physical disability," namely, "general debility," and that as the issue of March 18th, 1901, increasing the pension, was for "mental or physical disability," namely, "rheumatism, heart trouble, vertigo and impaired sight," he is entitled

to be certified and paid a fee of \$10 for preparing, presenting and prosecuting the claim for increase under section 4 of the act of June 27th, 1890, and he therefore prays that a writ of mandamus issue, directed to the respondents, commanding the Secretary of the Interior to grant his petition of appeal, and commanding the Commissioner of Pensions to certify and order paid, according to the course and practice of the Pension Bureau, a fee of \$10, less the \$2 already paid. (See Record, pp. 1-4.)

The return to the rule to show cause why the prayer of the petition should not be granted is in substance and form a demurrer, and prays that the rule may be discharged for the following reasons :

"1. Because the subject-matter set forth in said petition is purely of executive cognizance, resting in the judgment and discretion of these respondents as Secretary of the Interior and Commissioner of Pensions in the ordinary discharge of their official duties.

"2. Because the aforesaid subject-matter is one in which judgment and discretion are to be exercised.

"3. Because the petition does not state facts sufficient to constitute a cause of action.

"4. Because the petition is bad in substance."

(See Record, p. 5.)

The relator filed a replication to the above return, setting forth that he had, in and by his petition, set forth facts sufficient to require the respondents to do and perform the acts in said petition prayed. (See Record, p. 6.)

The cause was heard by Mr. Justice Claybaugh on January 24th, 1902, as on demurrer, with the following fact admitted, namely, that no agreement or contract for an attorney's fee was made by the applicant, Thomas Irwin, with his attorney, Mr. Phillips, or filed under the

declaration, for services in the increase case in question. (See Record, p. 6.) For stipulation as to fee agreement see Record, p. 8.

ARGUMENT.

Our contention is that by the plain reading of the statutes the petitioner is entitled to a fee of \$10 upon the grant of the increase of pension to Thomas Irwin, and that no discretion whatever resides in the Department officials with reference to the matter. If we be correct in this position, the mandamus prayed for, we submit, must go.

Thomas Irwin was pensioned under the act of June 27th, 1890, at \$6 per month, for disability resulting from "general debility." On October 4th, 1899, the petitioner filed his declaration for increase of pension under that act, alleging rheumatism, heart trouble, vertigo and impaired sight as additional disabilities. On March 18th, 1901, a certificate was issued increasing his rate of pension from \$6 to \$12 per month for disability resulting from general debility, rheumatism and disease of heart. It will be observed that in the first instance Irwin was granted a pension for "general debility," and that his pension was increased for "rheumatism and heart disease" as new causes of disability.

Under the act of March 3d, 1891, it is provided that:

"Hereafter no agent or attorney shall demand, receive or be allowed any compensation, under existing law, exceeding \$2 in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed."

The question in this case, therefore, turns upon the fact whether Thomas Irwin was granted an increase of pension "on account of the increase of the disability for which the pension had already been allowed" or for increase of disability resulting from new and other disabilities.

It will be borne in mind that this cause was heard on demurrer; that is to say, upon an admitted state of facts; that is to say further, upon an admission of the truth of the facts pleaded in the petition for mandamus. That petition alleges that the claimant was originally pensioned for "general debility;" that he applied for an increase of pension under the act of June 27th, 1890, for rheumatism, heart trouble, vertigo and impaired sight, as additional disabilities, and that on March 18th, 1901, a certificate of pension was issued, increasing his rate from \$6 to \$12 per month for disability resulting from general debility, rheumatism and disease of the heart. It will, therefore, be observed that the pension in question was increased for rheumatism and heart disease as new and additional causes of disability, in addition to the disability for which the pension had been originally granted. These facts are admitted, and as the fourth proviso of the act of March 3d, 1891, provides for a fee of \$2 only in cases of claim for increase of pension on account of the increase of the disability for which the pension had been allowed, the admitted facts of this case, therefore, show that the proviso just mentioned has not, and cannot possibly have, any application whatever to the allowance of a fee to Mr. Phillips in securing the increased pension for Thomas Irwin.

The reason that Congress has seen fit to provide for the payment of a fee of \$2 only to an attorney for securing for a claimant an increase of pension on account of the increase of the disability for which the applicant has been already pensioned obviously is for the reason that beside the declaration for increase, the attorney has practically no other services to perform, the question then becoming one of merely medical examination of the applicant, to ascertain whether the very disability for which he is drawing a pension has physically increased so as to entitle him to draw an increased rate of pension, and this in the Department is known as "straight increase;" whereas in the case of an application for an increase of pension on account of new and additional

disabilities, besides those for which the applicant was already granted a pension, it puts the attorney to the labor of proving all the facts to show the right of the applicant to pension for such disabilities, the same as would be performed under any original application for pension, and such an application for increase is, in effect, an original application for pension, and which is so recognized in the various pension laws.

Having shown that the act of March 3d, 1891, does not apply to the relator's case, the question arises, under what act is his fee payable? Upon that head we refer the Court again to the fact that it is admitted that the increase of pension was granted under the second section of the act of June 27th, 1890. Now, the fourth section of that act provides that the attorney prosecuting any claim under its provisions shall not contract for, demand or receive a greater sum than \$10, which sum shall be payable only upon the order of the Commissioner of Pensions. It is also admitted that no agreement for fee was made or filed in the case. Therefore, the fee "shall be payable only upon the order of the Commissioner of Pensions." We say that this last-mentioned provision makes it mandatory upon the Commissioner of Pensions to pay a fee of \$10 in the absence of a fee agreement; but if anything is wanting to show that it is his duty so to do, it is supplied by the rules and regulations of the Department of the Interior, under the act of June 27th, 1890, and which provide that no contract for attorney's fee shall provide for a sum greater than \$10, but in the absence of a contract the attorney's fee shall be \$10. These rules and regulations were promulgated at the time of the passage of the act mentioned as of the date of its passage, and have been continued in force ever since, as will appear by Appendix A annexed to this brief.

These orders and regulations of the Department have the force of law. That was admitted on the argument in

the court below, and was so decided by the Supreme Court of the United States in the case of *Caha v. U. S.*, 152 U. S. 221.

While we admit that if the appellees can lay claim to a scintilla of discretion in the matter of interpreting the law or laws regulating the fee of an attorney in the case in hand, the writ of mandamus will not be awarded, yet, on the contrary, we confidently assert that the facts of this case are so clear and unambiguous, and the law arising upon those facts so certain and unmistakable, that there is left no room for construction, consequently, no right to discretion, and that there remains only the clear, plain mandate of the law, that the Commissioner of Pensions must and shall order paid to the relator the fee of \$10 for prosecuting the applicant's case for an increase of his pension on account of new disabilities other than those for which he had formerly been pensioned; and that, therefore, the decree of the Court below should be reversed, and the cause remanded, with an order that the writ of mandamus should be issued as prayed for.

Respectfully submitted,

H. D. PHILLIPS,

Att'y pro se.

E. R. WALKER,

Of Counsel.

APPENDIX A.

THE ACT
 GRANTING PENSIONS TO SOLDIERS AND SAILORS WHO ARE
 INCAPACITATED FOR PERFORMANCE OF MANUAL
 LABOR, AND PROVIDING FOR PENSIONS TO WID-
 OWS, MINOR CHILDREN AND DEPENDENT
 PARENTS, APPROVED JUNE 27, 1890,
 AND
 THE RULES AND REGULATIONS THEREUNDER, PROVIDED
 BY THE SECRETARY OF THE INTERIOR.

* * * * *

Rules and Regulations.

* * * * *

The rules and regulations of the Department will govern all applicants and attorneys.

No contract for attorney's fee shall provide for a sum greater than \$10, but in the absence of a contract the attorney's fee shall be \$10.

GREEN B. RAUM,
Commissioner of Pensions.

The foregoing rules and regulations, with the forms here following, are adopted and approved.

JOHN W. NOBLE,
Secretary of the Interior.

The above rules and regulations were confirmed and continued by H. Clay Evans, Commissioner of Pensions, and Ethan Allan Hitchcock, Secretary of the Interior, as appears by the records in the Pension Bureau, and as published in the laws of the United States governing the granting of army and navy pensions, together with the regulations relating thereto, compiled in the law division of the Bureau of Pensions, and published in accordance with the provisions of section 4748 of the Revised Statutes, by H. Clay Evans, Pension Commissioner, Washington, May, 1899.

FEB 27 1902

Robert Wilby
CLERK

Court of Appeals, District of Columbia.

JANUARY TERM, A. D. 1902.

No. 1176; No. 15, Special Calendar.

UNITED STATES EX REL. HENRY D. PHILLIPS,
APPELLANT,

VS.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
AND H. CLAY EVANS, COMMISSIONER OF PENSIONS.

BRIEF FOR THE APPELLEES.

ASHLEY M. GOULD,
*United States Attorney for the District of
Columbia, Attorney for Appellees.*

Court of Appeals, District of Columbia

JANUARY TERM, A. D. 1902.

No. 1176; No. 15, Special Calendar.

UNITED STATES EX REL. HENRY D. PHILLIPS,
APPELLANT,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR,
AND H. CLAY EVANS, COMMISSIONER OF PENSIONS.

BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

On September 25, 1901, Henry D. Phillips, the appellant, filed in the supreme court of the District of Columbia his petition for a writ of mandamus against Ethan A. Hitchcock, Secretary of the Interior, and H. Clay Evans, Commissioner of Pensions, to compel the Pension Commissioner "to certify and order paid . . . a fee of ten dollars provided for in the fourth section of said act of June 27, 1890, or such part thereof as remains unpaid (two dollars thereof having been paid upon the certification and order of said Pension Com-

missioner upon the issue of said increase of pension certificate as aforesaid)." There was also a prayer in said petition that the Secretary of the Interior be commanded to grant the prayer of a "petition of appeal" theretofore taken by appellant from the decision of the Commissioner of Pensions.

The petition alleged that on October 4, 1899, appellant, as attorney for one Irwin, a private in a Pennsylvania regiment in the war between the States, filed a declaration for increase of his pension theretofore granted under the act of Congress approved June 27, 1890, which said pension was at the rate of six dollars per month and had been allowed for "general debility;" that the declaration for increase of pension for said Irwin was based upon the allegation that the pensioner was suffering "from rheumatism, heart trouble, vertigo and impaired sight," in addition to the disabilities for which he had formerly been pensioned, to wit, "general debility." The petition further recites that on the 18th of March, 1901, an increased pension of twelve dollars a month was granted Irwin, and that on the same day appellant was paid a fee of two dollars for his services in said claim for increase, the Commissioner of Pensions claiming that no greater fee was due appellant by reason of the provision of an act approved March 3, 1901, which provision reads as follows:

"Hereafter no agent or attorney shall demand, receive or be allowed any compensation under existing law exceeding two dollars in any claim for increase of pension on account of the increase of the disability for which the pension has been allowed."

The petition further sets forth that by the fourth section of the act of June 27, 1890, under which the original pension was granted, appellant should have been allowed a fee not exceeding ten dollars, and that on May 13, 1901, appellant appealed to the Secretary of the Interior from the action of

the Bureau of Pensions in certifying said fee of two dollars, contending that he was entitled to a fee of ten dollars under the act of June 27, 1890, and that on June 20, 1901, the Secretary of the Interior denied said appeal and affirmed "that the fee in a claim for increase under the act of June 27, 1890, regardless of the cause upon which said claim is based, is governed by the fourth proviso of the pension appropriation act of March 3, 1891, and cannot exceed two dollars."

Upon return of the rule to show cause granted on the foregoing petition the respondents filed a return in the nature of a demurrer, alleging, among other reasons why a writ of mandamus should not issue, that "the said subject-matter set forth in said petition is purely of executive cognizance, resting in the judgment and discretion of these respondents as Secretary of the Interior and Commissioner of Pensions in the ordinary discharge of their official duties, and also that the aforesaid subject-matter is one in which judgment and discretion are to be exercised." To this return appellant filed a replication, and the cause was heard in the supreme court of the District of Columbia, before Mr. Justice Clabaugh, on January 24, 1902, upon the said petition, return, and replication, who, upon the conclusion of the argument, without filing any written opinion, ordered and adjudged that the rule be discharged and the petition dismissed at the cost of the petitioner.

From this judgment an appeal has been taken to this court.

ARGUMENT.

The ruling of the court below is fully sustained by the decision of this court in the case of United States *ex rel.* Henry D. Phillips, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior, and H. Clay Evans, Commissioner of Pensions, decided January 7, 1902, and reported in 30 Washington Law Reporter, at p. 45. In the latter case the appellant, relator in the court below, sought the intervention of the same court to compel the same officials to allow him a fee which he claimed to be due under the proper construction of a certain statute, instead of the fee actually allowed him by the Commissioner of Pensions upon the construction of the statutes adopted by the latter official and sustained by the Secretary of the Interior.

The petition in the case already decided by this court contained the following prayer:

“Your petitioner therefore respectfully prays that a writ of mandamus may issue out of, and under the seal of, this honorable court, to be directed to the Honorable Ethan A. Hitchcock, Secretary of the Interior, and the Honorable H. Clay Evans, Commissioner of Pensions, commanding and enjoining him, the said Secretary of the Interior, to grant the prayer of your petitioner’s said petition of appeal aforesaid, and commanding and enjoining him, the said Commissioner of Pensions, *to certify and order paid, according to the course and practice of the Pension Bureau, the fee of twenty-five dollars* provided for in your petitioner’s said articles of agreement, made between him and the said John Gale, and duly filed in the office of the Commissioner of Pensions aforesaid, or such part thereof as remains unpaid (ten dollars thereof having been paid upon the certification and order of said Pension Commissioner, upon the issue of said pension certificate).”

The petition in the case under consideration contained the following prayer:

“Your petitioner therefore respectfully prays that a writ of mandamus may issue out of, and under the seal of, this

honorable court, to be directed to the Honorable Ethan A. Hitchcock, Secretary of the Interior, and the Honorable H. Clay Evans, Commissioner of Pensions, commanding and enjoining him, the said Secretary of the Interior, to grant the prayer of your petitioner's said petition of appeal aforesaid, and commanding and enjoining him, the said Commissioner of Pensions, *to certify and order paid, according to the course and practice of the Pension Bureau, a fee of ten dollars provided for in the 4th section of said act of June 27th, 1890, or such part thereof as remains unpaid (two dollars thereof having been paid upon the certification and order of said Pension Commissioner, upon the issue of said increase of pension certificate, as aforesaid).*"

It will thus be seen that the relief sought by the appellant in each of these cases is practically the same and based upon a state of facts so nearly alike in each case as to be practically identical. The language of this court in the case already decided and above referred to can be used in reference to the facts in this case by simply changing the dates of the acts of Congress under consideration. For example, this court said (Law Reporter, p. 46):

"The determination of the question by the Commissioner of Pensions in the first instance, and by the Secretary of the Interior on appeal from his decision, whether the relator was entitled to contract for a fee with the pensioner under the provisions of the amendatory act of July 4, 1884, without power of reduction or rejection on the part of the Commissioner, or was governed in the matter of fee allowance by the provisions of section four of the act of June 27, 1890, clearly involved the exercise of discretion."

So it is apparent in this case that the determination of the question by these officials whether the relator was entitled to a fee of ten dollars under the act of June 27, 1890, or whether he was entitled to a fee of two dollars under the act of March 3, 1891, clearly involved the exercise of discretion. As was said by this court in the prior case (p. 46):

"In order to determine the claim of the relator to the payment of the fee demanded, the Commissioner of Pensions

was called upon to examine the act of July 4, 1884, and compare its provisions with others, particularly with those of the act of June 27, 1890, the first section of which amends or supplements section 4707 R. S., and which is the first section of the first-mentioned act. It seems necessary for him to interpret the meaning and application of the different laws in relation to the facts of the case. He was required not only to determine whether the application of the dependent father was to be granted under section 4707 alone, but also whether, though falling in the main under said section, it was not governed in respect of the proof and time of commencement, and also in the matter of fee allowance, by the provisions of the latter act."

So in this case the action of the Commissioner of Pensions, as well as of the Secretary of the Interior on appeal, involved a decision of the question under the statutes granting pensions, whether the disabilities upon the existence of which the pensioner obtained his increased pension, was an increase of the disability for which the original pension had been allowed, or whether it was an additional and different disability. And it is evident that the fee to which appellant was entitled depended upon the construction placed by the executive officers upon the statutes granting the pension. They were "called upon to examine the act" of June 27, 1890. They were also required "to interpret the meaning and application" of the act of March 3, 1891, and to render an opinion based upon their construction of these two acts as applied to the facts in the case in which appellant represented the pensioner.

From these considerations it seems apparent, as already stated, that this case is fully within the principles established by this court in the case above referred to, and that the judgment of the court below should be affirmed.

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Columbia, Attorney for Appellees.*

